Peter a/l Selvaraj & Anor v Cheng Bee Teik & Ors

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–128 OF 2002
KAMALANATHAN RATNAM J
28 AUGUST 2002

Tort *— Negligence — Road accident — Collision between two motorcycles and a motorvan — Apportionment of liability*

The first plaintiff was the rider of motorcycle PDK 3393 ('the motorcycle') at all material times and the second plaintiff was the grandmother and dependant of the deceased pillion rider of the motorcycle. The third plaintiff was the father and dependant of the deceased rider of motorcycle PDF 8839 ('Mua Yoo Sern'). The first and second defendants respectively were the driver and owner of motorvan PAY 7446. On 23 December 1998 at about 11.45pm, the first plaintiff with his pillion and Mua Yoo Sern were riding their respective motorcycles along Jalan Paya Terubong proceeding from the direction of Ayer Itam towards the direction of Relau. The first defendant was then proceeding from the opposite direction. The plaintiffs' pleaded case was that the first defendant overtook a vehicle ahead of him and encroached into the plaintiffs' path and collided into both the motorcycles. It was the pleaded case of the defence that the collision occurred as a result of both the motorcyclists encroaching into the first defendant's path from the opposite direction whilst racing with each other and thereby crossing over a double line in the centre of the road. The learned sessions court judge found the first defendant totally liable for the accident and made various awards for the parties. Dissatisfied with the said decision, the defendants appealed against liability and quantum.

Held, allowing the appeal:

(1) The learned sessions court judge had erred in finding that there was a lorry present. The defendants' half of the road measured four metres, which was approximately about $13^{1}/_{2}$ft wide. The first defendant said he was hardly about one foot from the left edge of the road. The second van driver testified that his van was five feet wide and that the first defendant's van was similar in width. Even assuming there was a lorry, there was no evidence, neither of the size of the lorry nor how far it was travelling from its left edge of the road. Surely, if the first defendant was about to overtake the lorry, he must have encroached a substantial distance into the plaintiffs' path. However, there was no such evidence. Only the front right side of the van had gone across the central double lines. The possibility of a lorry being present which the first defendant had alleged to have overtaken could not be accepted (see pp 172G–173A).

(2) The learned sessions court judge erred when she failed to give due weight to the mark 'I' on the sketch denoted as 'kesan tayar'. The investigating officer testified that this was not a brake mark but a mark caused by the tyre after it had punctured. The first defendant testified that when he began his journey, all his tyres were in good condition. There was evidence of an impact to the tyre and the tyre had been punctured. The photograph showed the drag mark of the van due to the punctured tyre, for a distance of 8.4m. The court was satisfied that the impact between the motorcycles and the van was at point 'I' which was clearly into the first defendant's path. The failure of the learned sessions court judge to consider this vital piece of evidence had resulted in miscarriage of justice to the defendants (see p 173D–F).

(3) It was obvious that both the riders of the motorcycles had encroached into the first defendant's path. The first defendant too could not have been driving one foot from the left edge as he testified. He too must have been keeping more to the centre when the collision occurred. The court, thus, found both the riders of the motorcycles and the first defendant equally liable (see p 173F–G).

[Bahasa Malaysia summary

Plaintif pertama merupakan penunggang motosikal berdaftar PDK 3393 ('motosikal tersebut') pada semua masa material dan plaintif kedua merupakan nenek dan tanggungan si mati pembonceng motosikal. Plaintif ketiga adalah ayah dan tanggungan si mati penunggang motosikal PDF 8839 ('Mua Yoo Sern'). Defendan pertama dan kedua masing-masing adalah pemandu dan pemilik van PAY 7446. Pada 23 Disember 1998, kira-kira pukul 11.45 malam, plaintif pertama dengan pembonceng dan Mua Yoo Sern menunggang motosikal masing-masing sepanjang Jalan Paya Terubong dari arah Ayer Itam menuju ke arah Relau. Pada masa itu, defendan pertama sedang menuju dari arah bertentangan. Kes yang diplidkan oleh plaintif-plaintif adalah bahawa defendan pertama memotong kenderaan di hadapannya dan memasuki lorong plaintif-plaintif dan melanggar kedua-dua motosikal. Kes yang diplidkan oleh pihak pembelaan adalah pelanggaran berlaku akibat daripada kemasukan kedua-dua penunggang motosikal ke dalam lorong defendan pertama, dari arah bertentangan ketika berlumba antara satu sama lain dan dengan itu telah menyeberangi garisan berganda di bahagian tengah jalan tersebut. Hakim mahkamah sesyen yang arif mendapati defendan pertama bertanggungjawab pada keseluruhannya untuk kemalangan tersebut dan membuat pelbagai award untuk pihak-pihak terbabit. Defendan-defendan yang tidak berpuas hati dengan keputusan tersebut merayu terhadap liabiliti dan kuantum.

A **Diputuskan,** membenarkan rayuan tersebut:

(1) Hakim mahkamah sesyen yang arif terkhilaf dalam mendapati adanya sebuah lori. Bahagian tengah jalan defendan-defendan berukur empat meter, lebarnya kira-kira $13^1/_2$ kaki. Defendan pertama berkata beliau berada kurang dari satu kaki dari bahagian B kiri jalan tersebut. Pemandu van yang kedua memberi keterangan bahawa kenderaannya bersaiz lima kaki lebar dan van defendan pertama sama lebarnya. Jika pun ada lori, tiada keterangan tentang saiz lori tersebut mahupun berapa jauh ia dipandu dari bahagian kiri jalan tersebut. Sudah pasti sekiranya defendan pertama hendak memotong lori tersebut, beliau semestinya C memasuki jarak yang substantial ke dalam lorong plaintif-plaintif. Walau bagaimanapun, tiada keterangan sedemikian. Hanya bahagian depan van tersebut telah menyeberangi garisan berganda di tengah jalan. Kemungkinan adanya sebuah lori yang defendan pertama dikatakan telah memotong tidak boleh D diterima (lihat ms 172G–173A).

(2) Hakim mahkamah sesyen yang arif terkhilaf apabila beliau gagal memberi pertimbangan yang sewajarnya kepada tanda 'I' di dalam lakaran yang dilambangkan sebagai 'kesan tayar'. Pegawai siasatan memberi keterangan bahawa itu bukan kesan brek tetapi kesan yang disebabkan oleh tayar setelah ia pancit. Defendan E pertama memberi keterangan bahawa apabila beliau memulakan perjalanannya, semua tayarnya dalam keadaan baik. Terdapat bukti pelanggaran kepada tayar dan tayar telah pancit. Gambar menunjukkan kesan heret van tersebut disebabkan oleh tayar pancit, untuk jarak sejauh 8.4m. Mahkamah berpuas hati bahawa F pelanggaran di antara motosikal dan van tersebut adalah di titik 'I' yang jelas memasuki lorong defendan pertama. Kegagalan hakim mahkamah sesyen untuk menimbang keterangan yang penting ini telah mengakibatkan kegagalan keadilan kepada defendan-defendan (lihat ms 173D–F).

(3) Adalah nyata bahawa kedua-dua penunggang motosikal telah G memasuki jalan defendan pertama. Defendan pertama tidak mungkin memandu satu kaki dari pinggir kiri sebagaimana yang dikatakan. Beliau juga mesti memandu lebih dekat kepada bahagian tengah apabila pelanggaran berlaku. Justeru itu, mahkamah mendapati kedua-dua penunggang motosikal dan defendan sama-sama bertanggungjawab (lihat ms 173F–G).] H

Notes

For cases on road accidents, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 887–1108

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Cases referred to

Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233 (refd)

Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512 (refd) A

Rajendran (*Shamila* with him) (*Dass Jainab & Assoc*) for the appellants/defendants.

Rhina Bhar (*Rhina Bhar & Assoc*) for the respondents/plaintiffs. B

Kamalanathan Ratnam J: The first plaintiff was the rider of motorcycle PDK 3393 at all material times and the second plaintiff is the grandmother and dependant of the deceased pillion rider of motorcycle PDK 3393. The third plaintiff is the father and dependant of the deceased rider of motorcycle PDF 8839 ('Mua Yoo Sern'). The first and second defendants respectively were the driver and owner of motorvan PAY 7446. C

Plaintiffs' case

On 23 December 1998 at about 11.45pm, the first plaintiff with his pillion and Mua Yoo Sern were riding their respective motorcycles along Jalan Paya Terubong proceeding from the direction of Ayer Itam towards the direction of Relau. The first defendant was then proceeding from the opposite direction. The plaintiffs' pleaded case is that the first defendant overtook a vehicle ahead of him and encroached into the plaintiffs' path and collided into both the motorcycles. D

E

Defendants' case

It is the pleaded case of the defence that the collision occurred as a result of both the motorcyclists encroaching into the first defendant's path, from the opposite direction whilst racing with each other, and thereby crossing over a double line in the centre of the road. In their counterclaim, both the defendants claimed relief from the first plaintiff in the event the second plaintiff succeeded in her claim. There is also a claim for a set off. F

Findings of the court

Having heard the evidence of the witnesses, the learned sessions court judge found the first defendant totally liable for the accident and made various awards for the parties. Dissatisfied with the said decision, the defendants appealed against liability and quantum. The plaintiffs filed a notice of motion which I heard on the day fixed for the hearing of the appeal. The notice of motion was for extension of time to file the notice of cross appeal against the award of damages only. Since the defendants had no objections, I granted order in terms. Parties then intimated to the court that they were prepared to proceed both with the appeal and the cross appeal, notwithstanding the fact that the notice of cross appeal had not been filed. G H

The first plaintiff testified that he was proceeding about two to three feet from the central double white lines at a speed of between 60–70kph. The sketch plan shows a left hand bend for the motorcyclists. There was not much traffic on that stretch of the road at that time. The first plaintiff's I

A evidence was that the scene of the accident was dark. Although there was a street light, it was some distance away from the scene of the accident. The reason he had kept to the centre of the road was because he could not see the central lines if he had kept to the left edge of the road. The light from his motorcycle was not bright enough. All of a sudden, he noticed about 50–60ft away a lorry approaching from the opposite direction. B However, when he was about 20–30ft away, he noticed the defendants' van attempting to overtake the lorry. He did not say if he was 20–30ft from the lorry or from the defendant's van when the van was attempting to overtake the lorry. His evidence was that when he saw the van attempting to overtake, he heard the sound of brakes of the van. He then collided into the C right side of the van. He, however, maintained that prior to the collision he did not encroach into the first defendant's half of the road.

The investigating officer testified that the mark 'I' on the sketch plan was 0.9m into the defendant's half of the road from the central double white lines. This mark 'I', he said, was caused by the tyre of the van after it had D punctured. It was not the commencement of a brake mark. The agreed sketch plan shows the mark 'I' which ended at the right rear wheel of the van, to be 8.4m in length.

The first defendant's evidence was that it being the Christmas period, he was ferrying nine passengers in his van as they had intended to go carolling at Ayer Itam. There was another van driven by the priest named E Jega and that van was ahead of his van. As he reached a right hand bend, he noticed two motorcycles approaching him from the opposite direction at great speed. The motorcycles then collided into the front and the rear right tyres of his van, respectively, causing both tyres to sustain punctures. As soon as both tyres were punctured, he was unable to control the van and it F began to swerve to the right. He confirmed that when he gave a statement to the investigating officer, he did not mention that there was a van proceeding ahead of him and in the same direction. The first time he saw both the motorcycles, they were about the distance of two cars. The van ahead of him was also that distance from him. Both his van and the van ahead of him were proceeding about one foot from their left edge of the G road. The first motorcycle collided into his front right tyre whilst the second motorcycle collided into his rear right tyre. Both the motorcyclists were speeding and his speed at that time was about 60kph.

The next witness called by the defence was a passenger in the first defendant's van who was sitting in the middle of the van. His evidence in H chief was similar to that of the first defendant except that he said that the van in front of them was about the distance of five cars away. At the material time, he was talking to the front seat passenger of the van. There were three rows of seats for passengers and he was seated in the front row. It was his evidence that both the motorcyclists were racing with each other. He testified that both the motorcycles fell, skidded and then collided with the I van with one motorcycle colliding into the front and the other to the rear of his van. He denied a suggestion that the van had encroached into the plaintiffs' path.

The third witness for the defence was the priest who was driving the van proceeding ahead of the first defendant's van. His evidence was that the two motorcyclists were racing, and as he came out of the right hand bend, the two motorcyclists just missed him. He did not see the collision between the motorcyclists and the van following him. He testified that both the vans with passengers were on their way to a house to carol. Under cross-examination, he confirmed that his speed at that time was between 60–70kph and that he was travelling about three to four feet from his left edge of the road. He was emphatic that there was no lorry behind him because when the motorcyclists missed him, he looked to the rear and saw the motorcycles near the centre line.

The learned sessions court judge found the first defendant totally liable because she held that there was no other van ahead of the first defendant. She came to this conclusion because the first defendant did not mention in his police report the existence of the van that he was following and because the investigating officer was not notified of the existence of this van. Having thus dismissed the presence of this van at the scene, the sessions court judge went on to hold that the court was entitled to presume that the said van was indeed the lorry that the first plaintiff said the first defendant was attempting to overtake.

To my mind, the learned sessions court judge erred in making such an assumption. It is necessary to see if the second van's presence was of any significance to this case. All that the driver of that van testified to was that the two motorcyclists were racing and when they neared his van he looked to the rear and saw them near the centre of the road. He did not see the accident. In fact, neither counsel asked the defendant why he did not mention the existence of the other van in his police report nor did either counsel ask the driver of the other van why he did not lodge a police report. He might well have given a valid reason. Besides, the second van driver's evidence could not have materially affected either party's case. However, the learned sessions court judge very conveniently substituted the lorry for this van. It must be noted that there was no observation made that any of the defence witnesses were prevaricating. Whilst the learned sessions court judge had not recorded the occupation of any of the witnesses, the first defendant testified that the driver of the second van was the priest himself and that all of them were going carolling. Surely, credence must be given to the evidence of the priest, at least to the fact that his van was there. There was no factual finding that the priest who took the oath to testify, had not told the truth. On this main issue, the learned sessions court judge had erred in finding that there was a lorry present. Besides, the defendants' half of the road measured four metres which is approximately about 13$^1/_2$ft wide. The first defendant said he was hardly about one foot from the left edge of the road. The second van driver testified that his van was five feet wide and that the first defendant's van was similar in width. Even assuming there was a lorry, there is no evidence, either of the size of the lorry nor how far it was travelling from its left edge of the road. Surely, if the first defendant was about to overtake the lorry he must have encroached a substantial distance

into the plaintiffs' path. But there is no such evidence. Only the front right side of the van had gone across the central double lines. The possibility of a lorry being present, which the first defendant is alleged to have overtaken, cannot be accepted.

The learned sessions court judge held that the plaintiffs had no reason to encroach because there were no vehicles ahead of the motorcycles. She, however, failed to take into account the admission of the first plaintiff that he had to proceed nearer to the centre because he could not see those central lines if he had kept to the left edge of the road. There is no logic in this statement. If he had only kept to the left edge of the road, he need not worry even if he could not see the central lines because he would be travelling well within his safe area. Further, his head lamp was weak and was not throwing the light far enough for him to see the road which, according to him, was dark. Riding a motorcycle which gave insufficient light, it was all the more incumbent on the first plaintiff to have kept to the left edge of the road. Then again under such conditions, his speed was between 60–70kph. Surely, it was his duty to ride at such a speed as would enable him to react to an emergency.

To my mind, the learned sessions court judge erred when she failed to give due weight to the mark 'I' on the sketch denoted as 'kesan tayar'. The investigating officer testified that this was not a brake mark but a mark caused by the tyre after it had punctured. The first defendant testified that when he began his journey all his tyres were in good condition. There is evidence of an impact to the tyre and the tyre had been punctured. The photograph shows the drag mark of the van due to the punctured tyre, for a distance of 8.4m. I am satisfied that the impact between the motorcycles and the van was at point 'I' which is clearly into the first defendant's path. The failure of the learned sessions court judge to consider this vital piece of evidence has resulted in miscarriage of justice to the defendants.

It is obvious that both the riders of the motorcycles had encroached into the first defendant's path. The first defendant too could not have been driving one foot from the left edge as he testified. He too must have been keeping more to the centre when the collision occurred. I thus found both the riders of the motorcycle and the first defendant equally liable. The pillion rider would no doubt succeed on a 100%. However, I granted the defendants an order for indemnity with costs against the first plaintiff in respect of the second plaintiff's claim. As to whether such an order can be executed as an indemnity or as a set off against the first plaintiff where the payment to the first plaintiff is made by the insurers of the defendants pursuant to compulsory insurance cover, is not for me to decide or to comment on at this stage.

Quantum

The defendants' appeal against quantum given in respect of the first plaintiff relates to loss of earnings and the award relating to the cost of prosthesis.

Loss of earnings

There was evidence that the first plaintiff's last drawn income was RM1,321.25. After six months of the accident, he tried to return to the same job where he worked, for two to three days. He was unable to continue as he had much standing to do at work. However, his employers were good enough to pay him a salary for three months after the accident. He then worked in his uncle's store at the counter and was paid RM400 per month. The learned sessions court judge took the earnings at an average of RM930. She rejected his claim for RM1,321.75 per month. Since his salary was RM600, and as the balance constituted allowances, she took an average allowance of RM300. She then awarded a sum of RM930 per month. She therefore awarded RM930 for three months and for the balance 16 years she awarded at the rate of RM530 per month. In respect of this, Mr Rajendran's complaint is that there ought to be a $^1/_3$ deduction from the total award made for future loss based on the Court of Appeal's decision in *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 which followed the decision of the Federal Court in *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 which gave the court the right to deduct a sum for contingencies and based on other vicissitudes of life and also taking into account the accelerated payment. Since it is open to each court to consider each case on its own special features when taking into account the principles of contingencies and other vicissitudes of life, and bound by the decision of the Federal Court and the Court of Appeal on the application of the said principle, I find that there ought to be a deduction made. However, since there was no basis nor explanation for a standard $^1/_3$ deduction, I am of the view that I am not transgressing the principle of stare decisis if I exercise my discretion based on the background of the lives of the plaintiffs herein, and make a deduction of $^1/_4$ of the total award made.

There was a cross appeal by the plaintiff that this award was too low. I allowed partially the appeal and awarded for three months actual loss at RM1,321.75. Applying the principle laid out in *Takong Tabari*, I deducted $^1/_4$ from the total award made for future cost of prosthesis.

In respect of the second respondent's claim, the grandmother testified that the deceased pillion gave her RM500 per month. The vouchers from the employer which were accepted showed his last drawn salary, including overtime earnings and other allowances and after taking all deductions, as RM1,660.80. She testified that the whereabouts of the deceased's parents was unknown both to her and to the deceased. She had three children. The eldest had died. The second is working in Kuala Lumpur and does not support her at all and the third child is retarded and stays with her. Other than the said RM500 per month, she has no other means of supporting herself and the retarded child. Whilst the question can arise as to whether the retarded son (the uncle) of the deceased could be termed a dependant under the Civil Law Act 1956 and capable of claiming support, the law must remain humane. It cannot be rigidly compartmentalized. It cannot be the law, that because some portion of the sum of RM500 would go to

support her retarded son, such sum must be deducted. After all, the RM500 is given to the grandmother for her to spend as she wishes. If she chooses to spend it on her dependant son, the law cannot penalize a mother for her love. The court however assessed the sum given to the mother at RM300 per month. I rejected Mr Rajendran's contention that a portion of the award in respect of the dependant uncle be deducted. The court awarded a 16 year purchase for the grandmother who was 66 years based on the pleadings, although again, the learned sessions court judge did not record the age of the grandmother when she gave evidence.

I set aside the award of RM300 and awarded RM500 per month but reduced the years of purchase to five years since the grandmother was already 66 years old.

The third respondent was the father of the rider of the second motorcycle. Again, his age has not been recorded, however, by consent parties informed me that the deceased's father was born in 1955, thus making him 47. There is clear evidence that the deceased's last known salary was RM1,653.10. The father testified that the deceased gave him RM800 per month, out of which RM500 was for his use, whereas the balance RM300 was for his wife. The court, however, found RM300 for the father with a purchase of 16 years. Mr Rajendran suggested a sum of RM200 for ten years. Having considered the evidence, I find that whatever the sum the son earned, it is reasonable that he gave his father RM300 since the mother is not claiming as a dependant. It is inconceivable that since the father himself testified that he was earning only RM600 a month, that he would spend the RM500 that he said the son gave him 'untuk beli pakaian, rokok dan lain-lain'. I accepted the award of RM300 made by the learned sessions court judge but I reduced the years of purchase from 16 years to ten years which is reasonable considering the vicissitudes of life which would no doubt include the prospect of the deceased son marrying in ten years time.

In respect of costs, I found it fair to order each party to bear his/her own costs.

Appeal allowed.

Reported by Peter Ling